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**Duane Reade, Inc. and Allied Trades Council.** Case 2-CA-34228, 2-CA-34229, 2-CA-34241, 2-CA-34235, and 2-CA-35145

September 15, 2004

## DECISION AND ORDER

BY MEMBERS SCHAUMBER, WALSH, AND MEISBURG

On February 18, 2004, Administrative Law Judge Eleanor McDonald issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel and the Charging Party each filed an answering brief, and the Respondent filed a reply brief. The General Counsel also filed cross-exceptions and a supporting brief, the Respondent filed an answering brief, and the General Counsel filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,<sup>1</sup> and conclusions, as

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<sup>1</sup> The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In describing the Respondent's December 6, 2001 wage offer, the judge inadvertently misstated the amounts by which the Respondent offered to increase the wages of pharmacists and of other employees; the correct figures are, for pharmacists, \$1 per-hour increase in each year of a 3-year contract, and, for other employees, 40, 30, and 30 cents per hour increases in successive years of a 3-year contract. The judge also inadvertently misstated the date on which the Respondent implemented the terms of its final offer; it did so on December 9, 2001. These inadvertent errors do not affect our decision.

In adopting the judge's finding that the Respondent violated Sec. 8(a)(5) and (1) by, in the absence of a valid impasse on August 31, 2001, unilaterally ceasing contributions to the Vacation and Fringe Benefit Fund, the Allied Welfare Fund, and the Union Mutual Fund, we additionally rely on the following: (1) the Respondent ceased contributions to the Vacation and Fringe Benefit Fund on July 1, 2001; and (2) the Respondent's negotiator, at the close of the August 31, 2001 bargaining session, requested that the Union continue to negotiate because the contract expired at midnight. Also, we disavow any implication in the judge's decision that the Union did not have a statutory duty to explore alternative means of providing the fund information requested by the Respondent. A union is "obliged to investigate alternative sources of the requested information, or to explain its unavailability." *Hospital Workers (Johns Hopkins)*, 273 NLRB 319, 320 (1984). Any failure by the Union to satisfy its obligations in this respect, however, does not legitimize the Respondent's unilateral cessation of fund contributions.

modified, and to adopt the recommended Order as modified.<sup>2</sup>

We agree with the judge that the parties were not at a valid impasse when the Respondent declared impasse and implemented its final offer. In reaching this conclusion, we rely primarily on the parties' course of dealing at the final bargaining session, held on December 6, 2001.<sup>3</sup>

The Respondent began the December 6 session by making a comprehensive proposal that included the Respondent's withdrawal from the Union's Vacation and Fringe Benefit Fund, and the substitution of a 401(k) plan for the Union Mutual Fund and a new health insurance plan for the Allied Welfare Fund. The proposal also included a significant increase in the Respondent's wage offer then on the table—the proposed increase in the hourly wage for pharmacists doubled from 30 to 60 cents in each year of the proposed 3-year agreement, and the proposed increase in the hourly wage for all other unit employees doubled from 20, 15, and 10 cents for each year respectively to 40, 30, and 20 cents. After making this proposal, the Respondent stated that all of its prior nonwage proposals were still on the table as well.

The Union's negotiator responded by explaining to the Respondent that the funds were less costly to the Respondent than the company's benefit plans were. The Union's negotiator then rejected the proposal, stating that the Union would not accept a reduction in benefits, which it considered the Respondent's health and 401(k) plans to be. He said that the Union would not move from its position that there would never be an agreement unless the Respondent agreed to stay in all three union funds; he did state, however, that the Union would seek to reduce the cost of the funds. He also made a counter-proposal on wages.

At that point, the Respondent's negotiator withdrew to confer with his principals. When he returned, the Respondent's negotiator circulated the "Last, Best and Final Settlement Offer of Duane Reade," which took the form of a series of amendments to the expired collective-bargaining agreement. The final offer contained the

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Member Schaumber agrees with his colleagues that the Respondent violated Sec. 8(a)(5) and (1) when it failed to pay its employees for accrued sick leave on or about August 31, 2002; however, he would find that the Respondent's duty to do so survived the August 31, 2001 expiration of the parties' collective-bargaining agreement as part of the Respondent's status quo obligations.

<sup>2</sup> In her recommended Order, the judge inadvertently omitted the requirement that the Respondent make whole the employees for losses suffered as a result of the Respondent's unilateral change in the terms and conditions which applied to unused sick leave. We modify the recommended Order to provide this requirement.

<sup>3</sup> Unless indicated otherwise, all dates referred to are for the year 2001.

same funds proposals described above, and included an additional wage increase beyond that offered at the beginning of the December 6 session: for pharmacists, a \$1 per-hour increase for each year of the contract; for other employees, 40, 30, and 30 cents per hour increases in successive years of the contract. The final offer also contained the following term:

IT IS EXPRESSLY UNDERSTOOD BY THE PARTIES THAT THERE ARE NO CONTRIBUTIONS DUE FROM THE EMPLOYER TO ANY OF THE PREVIOUSLY EXISTING UNION FUNDS FOR THE PERIOD COMMENCING SEPTEMBER 1, 2001 THROUGH THE DATE OF THIS AGREEMENT (IN THE CASE OF THE VACATION FUND FROM JULY 1 THROUGH THE DATE OF THIS AGREEMENT).

The dates stated in this proposed term correspond to those on which the Respondent had previously unilaterally ceased contributions to those employee benefit funds.

The Union did not reject the final offer; rather, it requested additional time to review and consider the new offer. The Respondent's negotiator emphasized that this was the Respondent's last, best, and final offer, and that the Respondent would implement its provisions on December 9. Nevertheless, and somewhat inconsistently, the Respondent acquiesced to the Union's request for an additional bargaining session, to be held on December 12, stating that, although its proposal was final and would not change, it would consider "repackaging" the terms of the offer.

The Respondent implemented the terms of its final offer on December 9. The December 12 meeting was cancelled by the Union. The record is silent as to when the cancellation took place.

Considering the parties' course of dealing at the December 6 bargaining session, including the significant movement embodied in the Respondent's wage proposal and the inclusion in its final offer of a new proposal that the Respondent's delinquent contributions to the funds be retroactively excused,<sup>4</sup> the further movement shown by the Union's counter-proposal, the Union's request for additional time to consider the final offer, and the Respondent's acquiescence to that request coupled with a statement that it would consider repackaging the pro-

posal, we agree with the judge that the parties had not yet exhausted the prospects for concluding an agreement. *Taft Broadcasting Co.*, 163 NLRB 475 (1967). Therefore, we find that the parties had not reached a valid impasse when the Respondent declared impasse and implemented its final offer.

#### ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Duane Reade, Inc., New York, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(b).

"(b) Upon request of the Union, rescind implementation of the final offer dated December 6, 2001, and restore the terms and conditions of employment existing prior to the unlawful changes, with interest where appropriate."

2. Insert the following as paragraph 2(c) and re-letter the subsequent paragraphs.

"(c) Make employees whole for any loss of earnings and other benefits suffered as a result of Respondent's unilateral changes in the terms and conditions which applied to unused sick leave prior to the unlawful change in September 2002, in the manner set forth in the remedy section of the judge's decision."

3. Substitute the attached Notice for that of the administrative law judge.

Dated, Washington, D.C. September 15, 2004

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Peter C. Schaumber,	Member
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Dennis P. Walsh,	Member
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Ronald Meisburg,	Member
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(SEAL) NATIONAL LABOR RELATIONS BOARD  
APPENDIX

NOTICE TO EMPLOYEES  
POSTED BY ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD  
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

<sup>4</sup> The General Counsel cross-exceptions to the judge's dismissal of the allegation that the Respondent, by including this term in its final offer, illegally insisted to impasse on a permissive subject of bargaining. We agree with the General Counsel that, as a general proposition, a party may not insist to the point of impasse on a permissive subject of bargaining. See generally *NLRB v. Borg-Warner Corp.*, 356 U.S. 342 (1958). In light of our disposition of this case, however, we need not pass on the General Counsel's cross-exception.

## FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist any union  
 Choose representatives to bargain with us on  
 your behalf  
 Act together with other employees for your bene-  
 fit and protection  
 Choose not to engage in any of these protected  
 activities.

WE WILL NOT refuse to provide necessary wage infor-  
 mation requested by the Allied Trades Council.

WE WILL NOT fail to pay employees for accrued un-  
 used sick leave.

WE WILL NOT deduct union dues from your paychecks  
 and fail to remit the sums to the Union.

WE WILL NOT fail to make contributions to the Vaca-  
 tion and Fringe Benefit Fund, the Allied Welfare Fund,  
 and the Union Mutual Fund.

WE WILL NOT declare an impasse in bargaining with  
 the Allied Trades Council and unilaterally impose our  
 final offer before an impasse has actually been reached.

WE WILL NOT in any like or related manner interfere  
 with, restrain, or coerce you in the exercise of the rights  
 guaranteed you by Section 7 of the Act.

WE WILL provide the Allied Trades Council all the  
 wage information it requested on August 13, 2001, and  
 January 6, 2002.

WE WILL rescind implementation of our final offer  
 dated December 6, 2001, and restore, upon request of the  
 Union, the terms and conditions of employment existing  
 prior to the unlawful changes, with interest where appro-  
 priate.

WE WILL make you whole for any loss of earnings and  
 other benefits suffered as a result of our unilateral  
 changes in the terms and conditions that applied to un-  
 used sick leave prior to the unlawful change in Septem-  
 ber 2002.

WE WILL make required contributions to the Vacation  
 and Fringe Benefit Fund, the Allied Welfare Fund and  
 the Union Mutual Fund and WE WILL reimburse you for  
 any expenses resulting from our failure to make contribu-  
 tions to these funds with interest where appropriate.

DUANE READE, INC.

*Susannah Z. Ringel, Esq., and Micah Berul, Esq., for the Gen-  
 eral Counsel*

*Daniel F. Murphy, Jr., Esq., and Sean H. Close, Esq., (Putney,  
 Twombly, Hall & Hirson LLP), of New York, New York,  
 for the Respondent*

*William K. Wolf, Esq., (Friedman & Wolf), of New York, New  
 York, for the Charging Party*

*Henry I. Hamburger, Esq., of Leonia, New Jersey, for the  
 Charging Party*

## DECISION

## STATEMENT OF THE CASE

ELEANOR MACDONALD, Administrative Law Judge: This case  
 was tried in New York, New York, on March 24, 25 and 26,  
 2003. The Complaint alleges that Respondent, in violation of  
 Section 8 (a) (1) and (5) of the Act made unilateral changes,  
 failed to provide information to the Union, insisted to impasse  
 on a non-mandatory subject of bargaining, prematurely de-  
 clared impasse during negotiations and implemented its final  
 offer.<sup>1</sup> The Respondent denies that it has engaged in any viola-  
 tions of the Act. On the entire record, including my observation  
 of the demeanor of the witnesses, and after considering the  
 briefs filed by the General Counsel, the Charging Party and the  
 Respondent, I make the following.<sup>2</sup>

## FINDINGS OF FACT

## I. JURISDICTION

Respondent, a domestic corporation with an office and place  
 of business in New York, New York, operates retail drug stores  
 throughout New York City. The Respondent annually derives  
 gross revenues in excess of \$500,000 and purchases and re-  
 ceives goods and supplies valued in excess of \$5,000 directly  
 from suppliers located outside the State of New York. The par-  
 ties agree, and I find, that Respondent is an employer engaged  
 in commerce within the meaning of Section 2 (2), (6) and (7) of  
 the Act and that Allied Trades Council is a labor organization  
 within the meaning of Section 2 (5) of the Act.

## II. ALLEGED UNFAIR LABOR PRACTICES

## A. Background

For about 40 years the Allied Trades Council has represented  
 employees of the Respondent. The Union and the Respondent  
 have been parties to a series of collective-bargaining contracts  
 the last of which had a term from September 1, 1998 through  
 August 31, 2001.

The collective-bargaining agreement provides:

The Employer recognizes the Union as the sole collective  
 bargaining agent for the bargaining unit consisting of all em-  
 ployees in its employ, excluding part-time employees, as de-  
 fined below, Assistant Managers hired after September 1,  
 1998, executives, office employees, supervisors, warehouse  
 employees, drivers and guards. Whenever the word "employ-  
 ees" is used in this Agreement, it shall be deemed to refer to  
 all employees except for those specifically excluded above,  
 regardless of whether or not they are members of the Union.

<sup>1</sup> The General Counsel has not offered any argument in support of  
 the allegation that Respondent insisted to impasse on a non-mandatory  
 subject of bargaining. Consequently, I shall not find any violation of  
 the Act based on this allegation

<sup>2</sup> The record is hereby corrected so that at page 305, line 7-8, the  
 correct phrase is "for any loss prevention or security issues"; at page  
 334, line 16, replace the word "jinx" with the word "Jencks"; at page  
 383, line 14 replace "abstinent" with the word "obstinate".

In 1998 the Respondent purchased a company known as Rockbottom which owned drug stores whose employees were represented by other unions including Local 340-A of UNITE. Some of the Rockbottom stores were not organized. At the time of the instant hearing, Respondent operated about 240 stores in the New York metropolitan area.

The Board has found that in the year 2000 Respondent rendered unlawful assistance to UNITE at certain of its stores, unlawfully recognized UNITE and unlawfully entered into a contract with UNITE at certain of its stores, and engaged in certain unlawful acts designed to disfavor ATC such as denying ATC representatives equal access to its stores under threat of arrest and attempting to conceal its ownership of stores from ACT. 338 NLRB No. 140 (2003). More specifically, the Board found that Rizzo informed Morro that Respondent had brought UNITE into its stores because it had gotten a good deal financially from UNITE.

After a campaign pitting ATC against UNITE for the right to represent employees at certain of Respondent's stores, ATC was selected by the employees as the majority representative of both professional and non-professional employees in an election held in October 2001. The Decision and Direction of Election issued in Case No. 2-RC-22403 in August 2001 defined two units as follows:

UNIT A (Professional Unit)

Included: All full-time and regular part-time Pharmacists employed by the Employer at the 142 stores known as the Allied Trades Unit.

Excluded: All non-professional employees set forth in Unit B, and all other employees, and guards and supervisors as defined in the Act.

UNIT B (Non-Professional Unit)

Included: All full-time and regular part-time employees employed in the Employer's 142 stores known as the Allied Trades Unit.

Excluded: All other employees, including pharmacists set forth in Unit A, part-time employees who work 30 hours or less, during 12 consecutive weeks, assistant managers, executives, warehouse employees, drivers, guards, managers and supervisors as defined by the Act.

The uncontradicted evidence shows that employees in the Respondent's stores have a very high rate of turnover. The average cashier works for Respondent for only six weeks and the average stock clerk works for only eight weeks. Photo technicians stay in Respondent's employ for an average of six months. Pharmacy technicians stay on the job for an average of over one year. Pharmacists are generally employed for a period in excess of three years.

The Respondent also maintains a warehouse operation located at two distribution centers which employ warehousemen and drivers who are represented by Local 815, IBT. The uncontradicted testimony shows that the warehouse workers tend to be relatively highly paid and long term employees and that most of them are full-time employees.

*B. Dues Deductions*

Article "Fourth" of the ATC collective-bargaining agreement provides:

The Employer shall deduct uniform membership dues and initiation fees from the wages paid to each employee. The Employer shall make such deductions from the first payroll in each month and transmit all such funds deducted no later than the tenth day of each month. All funds deducted from the wages paid to employees . . . shall be held in trust by the Employer and shall be considered at all times the property of the Union, provided however, that prior to making such deductions the Employer has received from each employee on whose account such deductions are made, a written assignment, which shall not be irrevocable for a period of more than one year or beyond the termination date of this Agreement, whichever occurs sooner, and which may contain a clause that such assignment shall be automatically renewed for additional periods of one year, unless the employee shall terminate such assignment in writing within thirty days prior to any expiration date thereof.

The parties stipulated that Respondent made dues payments to the Union pursuant to the dues checkoff provision of the contract on a regular basis. The last dues period for which Respondent made dues payments was August 2001; the payment was remitted to the Union on November 12, 2001.<sup>3</sup> After August 2001 Respondent continued to deduct union dues from unit employees' paychecks through the pay period ending December 8, 2001. On December 12, 2001 Respondent refunded directly to the unit employees all dues collected from September 1 through December 8, 2001.

*C. Benefit Funds*

For many years Respondent has contributed to three funds maintained by the ATC which were designed to provide vacation and related benefits, medical insurance (welfare) benefits and a pension to employees.<sup>4</sup> The Respondent made contributions to these funds on behalf of its ATC bargaining unit employees and also on behalf of its warehouse operation employees who are represented by the IBT.

The contract provided that the company contribute a percentage of its gross payroll for each employee to the Vacation Fringe Benefit Fund regardless of the hours worked by the employee. Payments to the Fund were to be made weekly. The amount of vacation entitlement for each employee was determined as of July 1 of each year. Employees who had worked less than six months had no vacation entitlement. If an employee worked at least six months but less than one year, he earned one week's vacation. An employee had to work seven years to earn two week's vacation, and longer periods of time for more vacation entitlement. When an employee wished to

<sup>3</sup> It was usual for Respondent to send dues payments to the Union from two to three months after they were due.

<sup>4</sup> In the collective-bargaining agreement the vacation fund is identified as the Vacation Fringe Benefit Fund; it provides vacation, bereavement and jury duty pay to employees as well as a Christmas bonus. The pension fund is formally identified as the Union Mutual Fund and the health insurance fund is identified as the Allied Welfare Fund.

obtain vacation pay he was obliged to put in a request to his store manager. The manager sent the request to payroll. The payroll department then verified the entitlement and sent the information to the Vacation Fund administrator. The Vacation Fund then sent a check for the vacation at the employee's rate of pay. The company believed that this system produced delays and mistakes.

The parties agree that Respondent has not made any payments to the Vacation Fringe Benefit Fund covering any period after July 1, 2001.

The contract provided that the company would make monthly contributions to the Allied Welfare Fund equal to \$59/wk for each employee regardless of the number of hours worked by the employee. The contract also provided for monthly contributions to the Union Mutual Fund equal to \$24/wk for each employee regardless of the number of hours worked. The parties agree that Respondent has not made any payments to the Welfare fund or the Pension Fund covering any period after September 1, 2001. However, the funds continued to cover the employees until the end of 2001.

#### *D. Reimbursement for Unused Sick Leave*

Article "Sixteenth" of the ATC collective-bargaining agreement provides, in part:

All employees who have been employed for six months or longer shall be entitled to receive five (5) days of paid sick leave during each contract year. Employees shall receive a day's wages at their then current daily rate of pay for each day of sick leave utilized. On or about August 31, 1999, and on or about August 31 of each year thereafter during the term hereof, employees shall be reimbursed for all unused sick leave at their then current daily rate of pay for each day of unused sick leave.

The parties stipulated that pursuant to this provision of the agreement that expired on August 31, 2001 "Duane Reade's payments to ATC unit employees . . . were due on or about August 31 each year."

The parties agree that Respondent made payments for unused sick leave to unit employees in September 2000 and November 2001. Respondent made no payments for unused sick leave to unit employees in 2002. Respondent informed the Union in December 2002 that unit employees would not be paid for unused sick leave until January 2003. In the event, Respondent made these payments in February 2003.

During the negotiations for a successor agreement the company did not propose to change this provision of the contract. The last, best and final offer implemented by the company, described below, did not change the unused sick leave language of the expired contract.

#### *E. Request for Information*

On August 13, 2001 Henry Hamburger, Esq., counsel to the ATC, sent an e mail to James Rizzo, the Respondent's vice president for human resources and administration. The message stated that a delegation of employees had visited Hamburger's office that day with questions whether some employees had received the \$.30/hr wage increases due on each anniversary of their hirings. Hamburger's note listed about 70 names with

social security numbers and work locations for most of them. Hamburger asked for an immediate reply with the rate of pay at hire for each employee and the date and amount of any subsequent wage increases. The Union asked for 20% interest per month "If it turns out that any grievant is entitled to one or more wage increases."<sup>5</sup> The next day, August 14, Hamburger again wrote to Rizzo saying that although Seymour Stein is on vacation, "we cannot emphasize too strongly the need for an immediate response."<sup>6</sup> On August 16 John Morro, the ATC president, reiterated the need for an immediate response to the Union's request. Hamburger renewed his request on August 19, October 12, October 31, November 8 and December 13 in a number of e mails.

On December 21 the Respondent sent the Union a copy of its original information request. To the left of each name on the list, the hire date of the employee was provided. To the right of each name were listed various dates and figures, apparently meant to show the dates and amount of each subsequent wage increase. The employer's response did not give the employees' hire rates as requested by the Union. The Union responded with a request for further information on January 6, 2002. The information requested included hire rates for the listed employees as well as specific information required to verify that contractually mandated raises had been granted. The Union's request stated "Your response raises a number of additional questions which are set forth below. We realize that responding is costly and consumes time and therefore we propose two alternatives to requesting that Duane Reade respond to these questions." The alternatives suggested by the Union were to have a Union staff person or auditor review the payroll records for the named employees or for the Union to pay for an independent auditor to review the payroll records. There is no evidence in the record that the company responded to the January 6 request for further information.

#### *F. The Negotiations*

Respondent's vice president Rizzo testified that he began to work for Duane Reade in October 1998, having spent many years working in human resources for various companies. Rizzo stated that from October 1998 to September 2000 he had many conversations with Henry Hamburger, Esq., house counsel to the ATC.<sup>7</sup> One of the topics about which Rizzo and Hamburger spoke many times was the Respondent's employee retention problems and the high rate of turnover. Rizzo also told Hamburger on many occasions that he thought Respondent was paying too much to the employee benefit funds. Hamburger suggested that the Union and Respondent should try to iron out their positions before actual negotiations began for a successor collective-bargaining agreement to the one expiring August 31, 2001.

In the meetings that ensued the Respondent was represented by Rizzo, Daniel F. Murphy, Esq., director of human resources

<sup>5</sup> The record contains no evidence that any grievances were filed in connection with this matter.

<sup>6</sup> Seymour Stein is the Duane Reade director of human resources.

<sup>7</sup> Hamburger represented both the ATC and the ATC benefit funds for many years. He had apparently ceased representing the benefit funds at the time of the instant hearing.

Seymour Stein and vice president of store operations Jerry Ray, Sr. The Union was represented by Eugene Friedman, Esq., president John Morro and first vice president Rey Rosado. As indicated below, other people attended some of the sessions.

September 14, 2000

Respondent and the ATC met on September 14, 2000. The Union team included the participants listed above and was also accompanied by Steven Barasch, administrator of the Allied Welfare Fund, Linda Glaser, administrator of the Union Mutual Fund, and her husband, Richard Glaser who performs some services for the funds.<sup>8</sup> Attorney Hamburger was present but Attorney Friedman was not. When the meeting began Rizzo handed out a document headed "Objectives". This document provided:

Exclude Pharmacists as a covered position

Balance the H & W & Pension expense to 340A levels. Achievable by suspending Benefit & Pension contributions for the remaining four (4) months of this year.

Cancel retroactive payments of benefits. Return to six (6) month waiting period before benefit payments begin, even if this results in coverage beginning eleven (11) months from date of hire. Only if Pharmacists are not in the bargaining unit.

Recognize part-time employees, over twenty hours, in the bargaining unit. (UFCW, Local 1500 organizing drive)

Allow the Company to hire unlimited part-time employees.

Strike the conditions of having to work five (5) consecutive days for forty (40) hours. Hours availability should be based on business and spread over seven (7) days.

Language that renders whatever agreement we achieve null and void if ATC is ever sold or merged with another union and/or the current leadership loses control.

Withdrawal of all legal action filed against Duane Reade Inc., including pending non-discharge cases, filed for Arbitration.

Rizzo said his main concern was that the company needed to continue growing and that the competition in the area from other chains was formidable.<sup>9</sup> Rizzo said that Respondent's employees were compensated through a benefit program that was uncompetitive with other companies in New York. He said the company was paying a lot into the funds and yet employees did not have much coverage. Respondent's contract with 340-A UNITE provided less money for the benefit funds and more in wages. Rizzo said a full time work force made sense only for stores that remain open during normal business hours Monday through Friday. By the year 2000 almost all Respondent's stores were open seven days a week and some were open 24 hours a day. The company wanted relief from the ratio of full-

time to part-time workers set forth in Article "First" of the collective-bargaining agreement. The contract provided that employees would work five consecutive days but Respondent wanted to split the work week to get full-time employees working on weekends.

Rizzo testified that the collective bargaining agreement provided that the company make contributions to the welfare and the pension funds for employees who attained six months of employment. However, the funds did not begin covering such employees until five months later, that is after the employees attained eleven months of employment. Rizzo said at the end of 1998 and beginning of 1999 he and Hamburger had worked out a deal so that employees could be covered after six months of employment. The agreement was incorporated into a side letter which provided that for employees hired after January 1, 1999 "such payments shall be owed and paid commencing with the first day of the fifth month following the month in which such employee commenced employment with the Employer. For each employee employed on the first day of the sixth month following the month in which such employee commenced employment with the Employer, payments to the [Funds] shall be made retroactive to the first day of employment in accordance with the terms of [the contract]." As a result, employees achieved coverage after six months of work but the company did not have to make retroactive payments for employees who left its employ before becoming eligible for coverage.

Rizzo testified that at the September 14 session Barasch said the funds wanted to reverse the side letter. Barasch further said the funds would not give Respondent the relief it was seeking. Barasch said the rate for the welfare fund would increase from the \$59 weekly figure in the current contract to \$73/wk per employee.

On September 14, Hamburger said the Union welcomed part-timers but that it would not agree to an unlimited number of them. The ATC did not want to become a predominantly part-time representative. Morro remarked that the pharmacists wanted to stay in the Union.

Rizzo replied that the Union representatives should consider his objectives.

According to Rizzo, he and Hamburger spoke weekly during this time period. Right after the September 14, 2000 meeting Hamburger told Rizzo that the Union and the funds rejected all the company objectives and would not consider them.

ATC president Morro testified that he was given the company's objectives on September 14, 2000. Morro knew that the company wanted relief from the funds and that it did not want to participate in the vacation fund.

November 30, 2000

Morro testified that there was a second meeting on November 30, 2000 at the offices of Eugene Friedman, Esq. Besides Morro and Friedman, the Union participants were Rosado, "Mr. Reinsbach", Linda Glaser, Richard Glaser and Steven Barasch. Respondent was represented by Rizzo, Stein and Daniel Murphy, Esq. Rizzo said the pension fund was over funded, the health insurance was too costly and money was being put into the vacation fund too far in advance. Rizzo said that Respondent could not compete with the other pharmacy chains because

<sup>8</sup> Steven Barasch and Linda Glaser are the children of ATC founder, George Barasch. ATC president Morro testified that Richard Glaser is employed by LBG, which stands for Linda Barasch Glaser. Richard Glaser does computer work for the pension fund and sends out letters for the Union.

<sup>9</sup> The competition included CVS, Walgreens, Rite Aid and Genovese.

they did not have expensive benefit funds. Although Morro testified that Steven Barasch, Linda Glaser and Richard Glaser spoke at this meeting, he could not recall what they had said.

Morro also testified that the Union gave its formal written demands to the company. This testimony is borne out by Friedman's notes of the meeting. Although Rizzo testified that he did not meet Friedman until sometime in 2001, I find that his recollection was not accurate. I also find that his recollection that the company did not receive the Union's written demands until July 2001 was inaccurate. The Union's formal demands included:

Inclusion of part-time employees in unit

Include post-September 1, 1998 Assistant Managers in unit

Include in unit stores where there is no contract with another union and cover all stores to be acquired in the future by the ATC agreement

Warning notices to be in writing and expunged after six months

Four weeks vacation after 15 years and vacation pay to be based on hours worked on a steady basis

Reimburse unused personal days at current rate of pay

Wage increases due on first day of each year of the three year contract:

Pharmacist \$1.00/hr

Assistant Manager \$.75/hr

Planogram Team Cosmetic Supervisor, \$.75/hr

Stockman and Cashier \$.50/hr

Part-timers to be discussed

January 31, 2001

Morro testified that the parties met again in Friedman's office on January 31, 2001. The Union asked for the accretion of certain stores but Rizzo said they had been signed up by UNITE. Morro said the stores had been given to UNITE by Respondent. Morro said that Steven Barasch, Linda Glaser and Richard Glaser spoke at this meeting but he could not recall what they had said.

March 23, 2001

Morro testified that the parties met on March 23. Richard Glaser was present but his wife and brother-in-law were not there. Rizzo again asked for relief from the cost of the funds. Friedman said the Union would try to be flexible and give the company some relief. Glaser agreed with Friedman but he did not speak much.

Rizzo recalled that in early 2001 Morro telephoned him to say that Hamburger would no longer represent the Union in negotiations.<sup>10</sup> He set up a meeting to introduce Rizzo to Friedman. Rizzo said he met with Morro, Friedman and Stein in February or March 2001. Also present were Richard Glaser, Linda Glaser and Steven Barasch. Friedman had a copy of the "objectives" that Rizzo had given the Union in September 2000

and the parties went over each subject. Barasch said that the Union would not reduce the Welfare Fund contribution, in fact, Barasch was thinking that instead of raising the amount from \$59 to \$73 per week, the amount would go up to \$75. Barasch and the Glasers said that they wanted all payments remitted to the Fund from the first day of employment and to do away with retroactivity. Rizzo stated his belief that the funds were over funded. He said Respondent wanted to provide better wages and a less rich benefit program that was competitive with the market place.

Friedman's notes indicate that Richard Glaser was present but not Barasch or Linda Glaser. The notes do not indicate that the subjects testified to by Rizzo were discussed. I do not credit Rizzo's recollection of this meeting.

July 12, 2001

The Respondent was represented by Rizzo, Stein and Murphy. Friedman, Morro, Rosado and Richard Glaser were present on behalf of the ATC.

Rizzo testified that at the beginning of the meeting he asked Glaser what his role was. Glaser replied that he was an observer and that he might be in and out of the meeting. Friedman announced that he was doubling the Union's wage demands. The Union was now increasing its wage demand for pharmacists from \$1/hr to \$2/hr for each year of the contract, a \$6/hr increase over the life of the contract. The Union also increased the wage increase demanded for assistant manager from \$.75/hr to \$1.50/hr, for stockmen/cashiers from \$.50 to \$1.10/hr, and for pharmacy interns to \$1.50/hr and technicians to \$1.25/hr for each year of the contract, and for the planogram and cosmetics team from \$.75/ to \$1.25/hr. The Union would not agree to exclude pharmacists from the unit and it wanted them to receive time and one-half for overtime. Friedman said the \$24/wk rate for the pension fund was maintained but now contributions would start on the first day of employment. Friedman said the Welfare Fund would rescind its demand for an increase to \$73/wk and go back to \$59/wk per employee. However, because the Union wanted to end the retroactivity feature Rizzo explained it was in effect increasing the cost of the funds since 80% of Respondent's work force turned over in the first six months of employment. Further the Union proposed adding part-timers who had not previously been covered. The Union proposed to accrete all existing stores and any new stores to the unit. Respondent rejected the accretion demand and proposed recognition by means of authorization cards. Rizzo said the funds were over funded and thus Respondent was not competitive in its market. Rizzo said he would study the proposal and comment on it.

Murphy's notes are in general accord with Rizzo's testimony. They show that Rizzo was concerned about the competitive position of the company and that he found the Union's proposals very expensive. Rizzo told the Union that the funds were overfunded and that the present system benefited the funds and not the employees.

Morro testified that the Union raised its demands at the July 12 meeting as a reaction to its discovery that the company had signed a collective-bargaining agreement with 340-A UNITE. The UNITE contract provided higher wages and the ATC

<sup>10</sup> As indicated above, I find that Rizzo attended a meeting with Friedman on November 30, 2000.

wanted to show the employees that it was competitive with UNITE. Morro acknowledged that the cost of benefit contributions to the ATC funds was higher than in the UNITE contract.

Friedman's notes of the meeting say that he presented Union proposals with updated wage and Welfare Fund demands and that he gave copies of the original demands to the company.

July 26, 2001

The parties met on July 26. The Union was represented by Morro, Rosado and Friedman. There was no fund representative present. Murphy, Rizzo and Stein appeared on behalf of Respondent.

Rizzo testified that he responded to the Union demands at this session. He said that Respondent would consider adding part-timers depending on the negotiation of other economic factors. He said that Respondent considered the Assistant Managers to be supervisors. Rizzo said Respondent would agree to expunge all disciplinary notices after two years with the exception of violations relating to theft and loss prevention. The company said it would respond to the personal day reimbursement proposal when it knew what the total economic costs of the agreement would be. Respondent rejected the Union's demand that pharmacists be paid overtime.<sup>11</sup> Rizzo said he could not make a wage proposal because he did not know the economics of the funds and what flexibility the Union would give him as relief from fund contributions. Rizzo said Respondent wanted to withdraw from the Vacation Fund and pay the employees directly. The company was paying six months in advance of the vacation year which meant a float of six months equivalent to 4.4% of the payroll. Rizzo said if the company withdrew from the fund the employees would get their vacation money faster and the money would be available for the company until it had to be paid. Rizzo asked for an audit of the funds and a funding holiday for the Welfare Fund and the Pension Fund. Rizzo asked for information about the funds. Friedman replied that Respondent had to contact the funds directly for information.

Rizzo testified that in his view the Union was making exorbitant wage demands and that he could not respond until he knew what kind of benefit contribution relief he would get because the costs of wages and benefits were linked. Rizzo said he was unable to negotiate with the Union over the funds because Friedman said he had no control over them. As a result, Rizzo could not come up with a wage offer until he knew what the cost of benefit contributions would be. Rizzo believed the pension fund had a large surplus because Respondent contributed \$250,000 per month and Rizzo only knew of two (2) people actually receiving a pension. The company had received complaints from employees over the health benefit and it believed that for its \$59/wk payment to the Welfare Fund the benefits should have been better. Respondent knew that its competition was faring better in the benefits area. Rizzo testified that the CVS chain provided almost no benefits and had a one year waiting period for coverage. The Rite Aid chain had

salary and benefit costs below those in the current ATC contract.

Morro testified that Rizzo said the benefit funds were overfunded and he repeated his request for relief from the fund contributions. Morro replied that there were 1200 people vested in the pension fund because the Union had not long ago lowered the vesting period from five years to three years. Rizzo asked for an audit of the funds and Friedman replied that he should write to the funds directly with his request. Rizzo said the Vacation Fund was funded too far in advance. The company wanted to withdraw from this fund. Friedman said the Vacation Fund had been in existence for 40 years. Morro testified that from July 26 forward the Respondent consistently said it wanted to withdraw from the Vacation Fund. Morro testified that more than two former unit members were receiving pensions: he said "a number of people" were retired on pension, but he did not say how many this was.

The record shows that Respondent did request audits of both the Pension and Welfare Funds on August 6, 2001. The request directed to the Welfare Fund was refused by counsel in early September. The record contains no indication that audits were performed nor what the result may have been.

On August 3, 2001 a Decision and Direction of Election issued in case 2-RC-22361 et al for the unit represented by ATC. Both ATC and 340-A UNITE were on the ballot. The Unions were campaigning among the employees in August. Due to the events of September 11, 2001 ballots were not counted until October 19.

August 13 and 14, 2001

Rizzo testified that there was a session scheduled for August 13. Friedman was not there but was replaced by William Wolf, Esq. Wolf told Rizzo that he had no authority to make any proposals. Rizzo said he would present company proposals at the next meeting. Rizzo said he had written to the benefit funds about an audit but that he had not received any response. Murphy's notes show that Rizzo noted the upcoming election and proposed that the contract be extended. Wolf's notes show that the parties discussed the filing of a refusal to bargain charge and the extension of the contract and that the Union said it would consider the matters. Wolf's notes show that Rizzo mentioned that the company wanted pharmacists and assistant managers excluded from the unit and that he wanted to audit the benefit funds. Rizzo mentioned that the Welfare Fund had improved its benefits. Rizzo said that the bargaining was one pot and that money went either to benefits or to wages.

Rizzo testified that Friedman was present on August 14 with the usual Union committee. Rizzo gave the company proposals to the Union and explained each one. The Respondent wanted to delete limitations on part-time employees. Rizzo said he would consider the Union proposal to include part-timers in the unit if the Union would agree to eliminate restrictions on the number of part-timers in relation to full-time employees. The company proposed that not more than three named Union representatives could visit a store at one time and that visits not interfere with normal store operations. Rizzo proposed changing the work week so that employees would not necessarily receive two consecutive days off per week. Rizzo stated that the

<sup>11</sup> Respondent had treated the pharmacists as professionals under the FLSA for over 40 years. It had paid them straight time for overtime and it believed they should have a separate bargaining unit.



company wished to exclude pharmacists and all assistant managers from the unit.

Respondent asked for a one year funding holiday from the Welfare and Pension Funds without any diminution in benefits provided to employees. Rizzo repeated that he had asked for information from the funds. Rizzo asked for Friedman's help in obtaining information from the funds but Friedman said he did not represent the funds. Rizzo repeated that the funds were over funded. Rizzo stated that the company had learned from the employees that health benefits had been improved tremendously. Rizzo asked the Union why the Welfare Fund had increased benefits at a time when the Union was asking for more money from the employer and the Union was unable to provide any information about the state of the fund. The Union had put in a "Cadillac plan" but had not notified the company and was asking for more money to pay for it. Rizzo pointed out that the changes in welfare benefits must have a financial impact on the company which was paying for the plan but that the Union refused to provide any financial information to the company. Rizzo said the company wanted to delete the Vacation Fund from the contract and cease contributions as of July 1, 2001.

Rizzo asked for a wage proposal from the Union. Rizzo said he could not negotiate economic issues if the Union was still requesting a large wage increase and without any information about the benefit funds nor any information about relief from fund contributions. Rizzo said he could not address wages until the Union responded to Respondent's proposals on the funds. Friedman replied that the company should forget about a one year funding holiday. Friedman said he would make a wage proposal at the next meeting. Friedman replied that the pharmacists should be paid overtime for time worked after 40 hours per week.

Rizzo proposed that the parties enter into a one-year agreement effective September 1, 2001. Friedman replied that there was a practice of three-year agreements. Rizzo again asked Friedman to get some financial information from the funds and Friedman replied that he would see what he could but that he did not control the funds.

The company's written proposal contained the following paragraph:

All of the Employer's proposals and any agreement reached between the parties is/are expressly conditioned upon the ATC being certified as the lawful bargaining representative of the Employer's employees.

As stated above, an election had been ordered at the existing ATC-represented stores with both ATC and 340-A UNITE on the ballot. Respondent said it would continue to negotiate with ATC pending the election results. Rizzo proposed that any agreement reached would be contingent on the Union winning the election.

Morro's recollection about the meetings was not accurate and his testimony contradicted his affidavit. It seems probable that Morro could not separate the events of the 13 superth and 14 superth.

Morro recalled that Wolf told Rizzo that the Union had not received any dues payments since May. Morro testified that he and Friedman told the company that wages were the most im-

portant part of the negotiations. The Union knew that UNITE had received a wage increase that took the basic wage from \$5.15 to \$7.40 in three years. Morro and Friedman told Rizzo they wanted the same thing. Morro testified that from September 2000 to August 2001 Rizzo had said the most important issue for the company was the cost of the funds. Morro recalled that the Union said it would give the company some relief.

August 24, 2001

Rizzo testified that on August 24 Friedman replied to the company's proposals and the parties discussed some of the issues. Friedman asked the company what was meant by the company's statement that agreement was conditioned upon the Union being certified. Murphy's notes show that he replied that Respondent would continue to bargain. The Union did not agree to any of the company proposals. Friedman asked for a wage proposal from the company. Rizzo said that he was frustrated in that the Union was not moving on its wage demands and not providing information about the funds. Then the company caucused and it decided to put a wage proposal on the table to see if that would get the negotiations moving. The company proposed some small raises for certain employees: \$.10 for cashiers and stockmen and \$.05 for pharmacy and photo technicians. Rizzo emphasized that this was not the company's final offer.

Rizzo said the company intended to withdraw from the Vacation Fund. With 142 locations it was difficult to monitor vacations and some people waited months for a check from the Fund. Friedman replied that the funds are an integral part of the Union's make-up and the company could not withdraw from one of them; all of them are considered the same and the company had to stay in all of the funds. Friedman said the Union would not give a funding holiday from the Welfare or Pension Funds. Friedman promised to make a comprehensive proposal at the next meeting.

Murphy's notes show that the parties discussed the company's proposals in detail. The Union said that if there were a three-year contract the Union would consider "cost analysis and benefit costs." Murphy's notes show that Rizzo told the Union that the pension fund was amassing funds without any payout to the employees. There was an 80% turnover in employees every five months. Rizzo mentioned that the welfare fund had increased benefits.

Friedman's notes also show that the parties discussed the company's proposal in detail. The parties discussed the ratio of part-timers to full-time employees. Rizzo complained that he had not received any response to his request for information from the funds. Rizzo told the Union that the Pension Fund was amassing money without making any payments and that it was overfunded. The Welfare Fund had increased benefits and it would need more money down the road.

Morro's recollection confirmed Rizzo's testimony about the August 24 session. Rizzo's wage proposal, which he said was "just the start" and an attempt to narrow the gap, was not considered sufficient by the Union.

August 27, 2001

Rizzo testified that at this session the parties discussed part-time employees. The company and the Union discussed the funds but there were no changes in their respective proposals. Friedman asked the company to supply the job duties of the various employees in connection with the Union's formulation of a new wage proposal. At the end of the meeting Rizzo said "we're out of time", the collective-bargaining agreement expired in four days and he saw no chance of an agreement if the company did not know the total cost of the package.

Friedman's notes show that the parties discussed various details about the composition of the unit. Rizzo said that the company would withdraw from the Vacation Fund. He explained that the company paid into the Fund six months in advance and that the Fund had a huge float. Rizzo asked for more information about the funds.

Murphy's notes confirm Rizzo's testimony and are in accord with Friedman's notes. In addition, Murphy noted that when Rizzo talked about eliminating the Vacation Fund he said the Fund had enough money in it to pay for continuing benefits and that the Christmas bonus could be paid from the interest earned by the Fund. Murphy's notes show that Friedman asked Rizzo on what basis he believed that a funding holiday for the Pension and Welfare Funds was appropriate. Rizzo replied that he had suspicions and perceptions and that he had asked for information which was not supplied. Further, the Pension Fund had decreased the time for vesting from five to three years and the Welfare Fund was making constant improvements in benefits.<sup>12</sup>

Morro had no recollection of this meeting.

August 30, 2001

Rizzo recalled that at the August 30 negotiating session he said that he was at the end of the rope. The contract expired in less than 24 hours and the parties were very far apart. Rizzo asked whether Friedman was prepared to make any moves. Friedman said he was but that he had questions about the company's contract with 340-A UNITE. Rizzo answered all of the questions. Friedman asked about provisions relating to the proportion of full-time and part-time employees. Friedman asked about a vacation fund and Rizzo said there was none in the UNITE contract. Rizzo told the Union that the health coverage in the UNITE contract cost the company \$215 per month for each employee. Friedman asked Rizzo whether the company would add to a wage increase a portion of the savings achieved in any funding holiday for the benefit funds. Rizzo replied that he was not interested in dollar for dollar tradeoffs. Rizzo again asked for a one year funding holiday with no loss of benefits to employees. The Union caucused for about 1 1/2 hours and then Friedman said he had to break off the meeting to speak to some

Union people. Rizzo said he was willing to work through the night but Friedman said he would make some moves the next day.

Morro recalled that on August 30 the Union said it would be flexible and give the company some relief on the benefit funds.

Friedman's notes confirm Rizzo's testimony that the Union asked for and was given extensive information about the 340-A UNITE collective-bargaining agreement. Murphy's notes also show that the Union asked for information about the cost of benefits in contracts between the company and other unions. In particular the cost of the drug benefit and medical insurance were explained. There was discussion of Respondent's request for a funding holiday which was deemed "very important" by Rizzo.

August 31, 2001

Rizzo testified that on August 31 he asked Friedman for the Union wage position and he mentioned that he still had no information from the funds. The company needed information to resolve the issues. Friedman replied that the company could not leave the Vacation Fund and that it would not be given a funding holiday for the Welfare or Pension Fund. Friedman said the company had to move on its wage proposal and he said if the Union gave a funding holiday it wanted 60% of the savings to go toward wage increases. Rizzo said he would not trade dollar for dollar. The Union then proposed a three month funding holiday and no more retroactivity for the health and pension funds.<sup>13</sup> The company countered with a higher wage proposal. It asked for a one year funding holiday with an agreement to audit the funds and if they were over funded, for future funding holidays to be agreed upon. The company said it would withdraw from the Vacation Fund. At some point Friedman offered a six month funding holiday for the vacation fund with the amount to be made up after six months and payments to be continued monthly thereafter. Rizzo said he would agree to limit the number of employees working under 20 hours per week. Rizzo would agree to a three year contract. The company still wanted assistant managers and pharmacists excluded from the unit.

Friedman told Rizzo that the meeting had to end at 2:30 pm so he could catch a train. Rizzo said the company wanted to continue negotiations because the contract expired at midnight. Rizzo stated that if an agreement were not reached the company would cease paying into the funds. Friedman said that was not good faith bargaining. Friedman said the Union would study the company proposal and respond after Labor Day. Rizzo said the company would agree to a one year extension of the contract while negotiations continued. This would include no contributions to the Welfare and Pension Funds and no contribution to the Vacation Fund after June 30. The Union did not agree to the extension.

Morro did not recall the August 31 session.

<sup>12</sup> In response to questions posed by Counsel for the General Counsel Rizzo testified that he was aware of pending RICO, ERISA and LMRDA section 501 breach of fiduciary claims while he was conducting negotiations. On March 18, 2003 in *Bona v. Barasch*, 174 LRRM 2051, Judge Mukasey dismissed some claims for lack of standing and permitted other claims to go forward. One of the plaintiffs in that action is a Local 815 trustee of the three ATC Union funds. Morro is one of the defendants in that suit against whom Judge Mukasey found the plaintiffs had a reasonable likelihood of success if the allegations in the Complaint were proved.

<sup>13</sup> The Union proposed a funding holiday for the Welfare and Pension Funds in months 1,5 and 9 of the new agreement. The contribution to the funds would remain at current levels; \$59/wk for welfare and \$24/wk for pension. Certain adjustments in the eligibility periods were also proposed.

Murphy's notes show that Friedman began the meeting by making a proposal which was contingent on the pharmacists and part-time employees being in the unit. The Union proposed to freeze welfare payments at \$59/wk with a three month waiting period for coverage and no contributions during that time. The Union proposed a three month funding holiday for the Pension Fund. The Union proposed that no payments to the Vacation Fund would be due for six months, but that a payment for the entire six months would be due after January 1 and payment to be made every two weeks thereafter. The Union calculated that its proposals were worth \$3 million and it wanted 60% of that to be allocated to wage increases. Rizzo said the Union's offer should include a wage proposal. Rizzo remarked that the Union was only offering a partial funding holiday and Friedman replied, "If you want a year you aren't getting it." The company responded by saying it would use its best efforts to limit part-timers but would not agree to a quota. It still wanted pharmacists and assistant managers out of the unit and no agreement on two consecutive days off. The company agreed to expunge warning notices after two years. The company said it would withdraw from the Vacation Fund as of July 1, 2001. It wanted a one year funding holiday for the Welfare and Pension Funds with no loss of benefits. If audits of the funds showed no surplus in year two or three of the contract it would agree to maintain current rates of contribution. Respondent repeated its offer of wage increases of \$.10 and \$.05 in each year of a three year contract.

Friedman's notes seem to confirm Murphy's notes. However, they are difficult to read due perhaps to the speed with which they were made. Friedman's notes are clear however that the Respondent stated that it would stop contributing to the ATC Welfare and Pension Funds as of September 1 and withdraw from the Vacation Fund as of July 1. The Union said it did not agree to that and that it wanted to negotiate.

Rizzo testified that as of August 31 the Union had made a written wage demand which it had then doubled. Rizzo stated that the company wanted to increase wages but that it had to make sense out of the benefit areas in order to pay for it. Rizzo testified that he had agreed with Respondent's management that if there were no tentative agreement at the end of August the company would discontinue payments to the funds.

September 5, 2001

On September 5 the Union informed Rizzo that a sign had been put up in one of the stores to the effect that the collective-bargaining agreement had expired and that there was to be no union activity in the store. Rizzo said the company had not ordered this. Later Rizzo learned that an ATC member had posted the sign. The sign was taken down.

When the September 5 negotiations began, the Union asked for the company's position on the funds. Rizzo repeated that there was a perception that the funds were overfunded and this provided no benefits to employees. The funds did not need further contributions and this justified a funding holiday. The company did not want to pay for vacations in advance. Rizzo said that the company intended to withdraw from the Vacation Fund effective June 30, 2001. Rizzo said the Respondent would not make contributions to the Welfare and Pension Funds as of

September 1. He continued to demand a one year contribution holiday from the Welfare and Pension Funds and an audit in subsequent years to determine whether the holidays should continue. Rizzo told Friedman that the lawyer for the funds had rejected his demand for information and Friedman said he had no control over the funds. Friedman said that the company could not withdraw from the Vacation Fund; the funds are all one package. Both Murphy's and Friedman's notes show that Rizzo reviewed the history of negotiations about the funds so far. Rizzo complained that although Barasch had asked for an increase in Welfare Fund payments from \$59/wk to \$73/wk and had then withdrawn this demand, the Welfare Fund had announced a big increase in benefits without talking to Respondent and without supplying any information. Morro said the fund was paying out \$1.30 for every \$1.00 it took in.

Friedman said the Union would not alter its wage demand but that he would move on benefit issues. The Union modified its funding holiday proposal for both funds so that no payments would be due for months 1, 5 and 8.<sup>14</sup> With respect to the Welfare and Pension Funds, the Union proposed eliminating retroactive payments for new hires and to adjust the waiting period for benefits to three months. The Union said the company could not withdraw from the Vacation Fund but it continued to offer to defer the first six months of payments. The Union changed its demand for expunction of discipline to include one year with no new incidents. The Union said any wage agreement would have to be retroactive to September 1 and it asked for clarification of the company's position on the funds.

The Union asked the company to change its position. Rizzo replied by explaining why the Vacation Fund issue was very important to the company. Rizzo reiterated his position on funding holidays. Rizzo said he would agree to a three month wait for pension contributions without retroactivity and a five month wait for welfare contributions with no retroactivity. The company increased its wage proposal to raises of \$.10, \$.15 and \$.20 for cashiers and stock clerks in a three year agreement, and \$.05, \$.10 and \$.15 for pharmacy and photo technicians. The company wanted the wage agreement to take effect on ratification but the Union said wage increases had to be retroactive. The company asked the Union to move on its wage demand.

Morro seemed to testify that the Union made a new wage proposal on September 5, but this was not clear from the record. Moreover, none of the bargaining notes admitted into evidence show a new Union wage proposal on this day.

September 10, 2001

The Union team included William Wolf, Esq. in place of Eugene Friedman, Esq. Rizzo told Wolf that he had anticipated a Union wage proposal. He said the company had made three wage proposals. Rizzo said that the company had given its final position on funding holidays for the Pension and Welfare Funds. Rizzo said it was up to the Union to make an economic move. Wolf said he could not respond to the request for an audit because he did not control the funds. Wolf's notes show

<sup>14</sup> The record contains no explanation by the Union or anyone else as to the difference in a funding holiday for month 8 as opposed to month 9.

that Rizzo responded that the company did not trust the funds and that the funds were an economic issue. Murphy said that the Union had previously recognized a need for relief from the funds. Murphy stated that the company was paying too much into the funds and that the funds were paying out \$1.5 million bonuses. Wolf said the Union was tied to the funds but that it could not control them. When Rizzo asked whether the funds had authorized the three month funding holiday for the first year of the contract, Wolf replied that he deferred to Friedman on the funds. Wolf proposed changing the funding holiday earlier offered by the Union to months 1, 3 and 7. Rizzo testified that he told Wolf that this was not a significant change. Wolf replied that he was not authorized to do anything else. The parties discussed their positions concerning expunction of discipline.

The Union said no dues payments had been received for June and July. Rizzo said he would check on it.<sup>15</sup> Rizzo testified that as the meeting was drawing to a close Wolf asked why the company didn't just tell the Union that it wanted the 340-A UNITE agreement. Rizzo blurted out that if the Union wanted the same deal they could have a contract right now.

Morro's recollection of the September 10 meeting was unreliable. He testified that Friedman was present.

September 28, 2001

Rizzo stated that when the September 28 meeting began Friedman said he wanted to discuss the company proposal that the Union take the 340-A UNITE contract. Rizzo replied that he had not made such a proposal and he said it was an emotional outburst to what the Union said. Rizzo apologized for this. Rizzo told Friedman that the 340-A collective-bargaining agreement would have been considered when the negotiations began but it would be difficult to put it on that table at that point. Rizzo testified that Friedman said the company had the Union's best offer, but it was not a final offer. Friedman said if the Union won the upcoming election then everything would be off the table.

Murphy's notes show that Friedman said it was difficult to come up with a wage proposal because the benefit fund issue made life difficult. Rizzo said that the company had made three wage proposals, agreed to sign a three-year contract rather than a one-year contract and agreed on some form of expungement. Rizzo asked whether the Union wanted to wait until after the October election to reach agreement. Friedman's notes show that he told Respondent that after October the Union proposals on the three benefit funds would be withdrawn and the Union would be able to move on wages. Rizzo said the Union had to make concessions on the funds in connection with a wage demand. Friedman said he was dismissing that request out of hand because Respondent was not even offering the UNITE contract. Rizzo answered that the Union should cost out the UNITE contract and "let's bargain." Rizzo said the Union had not offered anything substantive. Then Friedman promised that the Union would give Respondent its final position.

Morro testified that he could not recall the September 28 meeting.

Morro testified that the election took place on October 19 and that the ATC won by 782 votes to 445 for 340-A UNITE.<sup>16</sup>

November 15, 2001

Rizzo testified that the November 15 session was the first after the election and that he congratulated the Union on its victory.

Murphy's notes show that Friedman began by saying that now the negotiations were serious. The ATC had demonstrated that it was the choice of the employees and this gave it a mandate to achieve a contract. Friedman wanted a "sea change" in the company's reaction. Friedman said there was support for the Union and that the Union was prepared to take Union-like action. He said there was a short leash and the parties needed to negotiate a contract promptly. Friedman said the Union was ready if the company wants to take it on.

Friedman said pharmacists had voted to be in the unit. He said the contract should be retroactive to September 1, 2001. Concessions relating to the funds were being withdrawn. Friedman said the company should settle certain lawsuits and pay the money it owed.<sup>17</sup> Friedman said part-time employees should be covered by the funds.

Both Murphy's and Friedman's notes show that Friedman stated the Union Pension Fund demand. Friedman proposed a three month funding holiday for months 1, 3 and 7 with half rate payments for the rest of the year. The Union wanted all part-time employees covered at one-half the full contribution rate. During the first year of the contract new hires would join the plan on the 92 supernd day of employment with no retroactivity. In the second and third years of the collective-bargaining agreement, the pension contribution rate would return to \$24/wk per full-time employee and one-half that for part-timers. Also in the second and third years the contribution would begin with the first day of employment.

Concerning the Welfare Fund, Friedman proposed that the company would contribute one-half the rate for part-time employees. For the first six months of the new contract, the company would contribute \$50/wk for each full-time employee and after that the rate would return to \$59/wk. New employees would join the fund on the 92 supernd day with no retroactivity.

The Union wished to retain the Vacation Fund but it proposed that the company make a lump sum payment after six months of no payments and then resume regular monthly contributions. The Union said any concessions it made on the funds should be used to provide additional benefits to unit employees.

Rizzo testified the pension demand by the Union was a regression. It was much more expensive than the current agreement which provided for a six-month waiting period before pension contributions were due. Under the current agreement as modified by the side letter, if an employee left before working

<sup>15</sup> Rizzo later learned that the checks were scheduled to go out and they were eventually sent to the Union.

<sup>16</sup> The Hearing Officer's Report on Objections issued on December 16, 2002 showed that there were about 2633 eligible voters and that 1440 votes had been cast in total.

<sup>17</sup> Apparently the trustees of some of the benefit funds had sued Respondent.

for six months, as most Duane Reade employees did, no payments were due for the pension. If an employee worked beyond six months then the payments were due retroactively. Further, the Union's new proposal included part-time employees who were not covered under the current system.

Rizzo told Friedman that the Union's new proposal was more expensive than what was already on the table. He remarked that in the past the Union had understood that benefit concessions were linked to wage improvements.

Both Murphy's and Friedman's notes show that Rizzo responded to the Union's demands. In place of the ATC welfare and pension funds Rizzo offered an enrollment in HIP and participation in the company 401(k) plan. Rizzo said the medical plan cost \$223/month per employee and was thus less expensive than the Union welfare plan. The HIP plan included prescription coverage and it had a six month waiting period for eligibility. Rizzo said this plan was better than the ATC welfare plan. Rizzo said the 401(k) plan permitted employees to begin contributions after 90 days. Rizzo pointed out that the 401(k) plan is portable unlike the Union pension plan. Rizzo said that the company would withdraw from the Vacation Fund and pay benefits directly to the employees. He told the Union there was no point in paying a third party to administer vacations. Finally, Rizzo said the company would give a "very meaningful wage increase." Rizzo emphasized that since the year 2000 the Respondent had been asking the ATC for relief from funds payments. Friedman asked questions about this offer and the company promised to provide the Union with more information about the two plans. Friedman then stated that the company 401(k) plan was rejected but that the Union would review the HIP plan.

Then Friedman said the Union still demanded a \$2 hourly increase for pharmacists in each year of the contract. However, the wage increase demands for other employees were changed. The new demand was for a \$.60 hourly increase immediately and \$.50 six months later, this to be repeated in the second and third years of the contract. Rizzo said the wage demands were now more expensive than anything the Union had asked for previously amounting to \$3.30 over three years for the non-pharmacist employees. Friedman replied that "everyone should know we are serious."

Rizzo replied that he wanted a deal and that he would give the Union a proposal at the next meeting.

Morro testified that he had analyzed the HIP plan and found that it was inadequate in that employees would not be able to afford the co-payments and that it did not have dental care. The 401(k) plan was illusory because low paid employees could not afford to contribute part of their wages and the company matching formula was very low.

November 21, 2001

Rizzo testified that on November 21 he informed the Union representatives that he was disappointed with the last Union change in position. As a result, Rizzo said, he would try to move in a different direction and he offered the company 401(k) plan and the HIP health coverage. Murphy's and Friedman's notes show that this had happened on November 15 as described above.

Rizzo denied that the Union decreased its wage demand for pharmacists to \$1.90 per year and that the Union decreased its wage demand for other employees to \$.55 and then \$.50. These figures appear in Murphy's notes and Friedman's notes.

The notes of both Murphy and Friedman show that on November 21 Rizzo began by offering a wage increase of \$.10, \$.15 and \$.20 for cashiers, interns and technicians. For pharmacists the company offered \$.30 in each year of a three year contract. This was tied to an incentive plan which Rizzo explained in detail. The company would withdraw from all three funds and was offering the HIP and 401(k) plan. The company explained the 401(k) plan. Friedman replied that this would leave the Union no choice and Rizzo reminded him that the Respondent had asked for a one-year funding holiday.

Friedman rejected the HIP and the 401(k) plans. Friedman said the Union was asking for a retroactive contract. The Union proposed a three month funding holiday for the pension fund with 1/2 contributions for six months and full contributions thereafter. The Union proposed to lower welfare contributions to \$50/wk for the first six months and resume \$59/wk thereafter. Part-time employees would be charged at 1/2 the rate. Welfare contributions for new employees would start after three months with no retroactivity. The first lump sum payment to the Vacation Fund would not be due for six months. The Union demanded a wage increase of \$1.90/hr for pharmacists in each year of a three year contract. It promised to examine the incentive proposal. Non-pharmacists would get an increase of \$.55/hr in the first month and \$.50/hr in the seventh month of the year, to be repeated in each year of the contract.

Rizzo responded that there would be a deal if it made economic sense. Rizzo said he was disappointed that the Union was nickel and diming the company. He said the fund and wage demands were "out of whack." Rizzo said the company would offer more in wages if there were substantial movement on the cost of the funds. Rizzo said that cost was very important to the Respondent.

December 6, 2001

Rizzo testified that on December 6 Friedman rejected the HIP plan. Friedman said there would never be an agreement unless the company agreed to stay in all three Union funds. Friedman said this was his final position. Rizzo asked for the Union's position on wages. Friedman replied that he would not consider wages until the funds issues were resolved. When Rizzo asked whether this was the Union's final position Friedman replied that it was. At that point Rizzo withdrew to telephone his management. Rizzo had been instructed that if the Union offered no movement that day he was to make a last, best and final offer on behalf of the company.<sup>18</sup> Rizzo returned to the bargaining and handed out a document dated December 6, 2001 which was in the form of an amendment to the expired collective bargaining agreement.<sup>19</sup>

<sup>18</sup> This last best offer was prepared by Rizzo in consultation with management a few days before the December 6 session.

<sup>19</sup> The document listed changes under the phrase "Amend the following provisions of the Agreement as set forth below."

Rizzo explained each point and asked whether there were any questions. Rizzo told the Union that the company would implement the provisions of its final offer on Monday, December 9. Friedman asked Rizzo for time to study the offer and respond. Rizzo agreed to meet with Friedman but he said that the company's offer was final and would not be altered. The parties agreed to meet on December 12. In the event, the Union cancelled the meeting.

The Respondent's last, best and final offer included the previous proposals on part-timers, assistant managers and other items such as the incentive plan for pharmacists, the HIP and 401(k) plans and direct payment of vacations to employees. However, the company's final offer contained significant movement on the wage offer. Now, the employer offered pharmacists an incentive plan and a raise of \$.60 in each year of a three year contract. For other titles, the company offered raises of \$.40, \$.30 and \$.20 in each year of the three year contract.

Rizzo testified that he believed the parties were at impasse on December 6, 2001. Rizzo denied that the Union reduced its hourly wage increase demand to \$1.80 for pharmacists and for other employees \$.50 twice in each year of a three year contract.

Both Murphy's and Friedman's notes show that after the company proposal was made the Union asked questions about the incentive plan and then the Union reduced its wage demand to \$1.80 per year for pharmacists without an incentive plan. The Union said that incentive plans did not work and that no drugstore chain in New York City had an incentive plan. The Union also reduced its wage demand for all others to \$.50 every six months. Friedman's notes show that he said that he had more room to move and that he would address the Welfare Fund costs. However, the ATC would not agree to a reduction in benefits. Murphy's notes show that Friedman compared the costs of the HIP plan to the current ATC Welfare Fund and tried to convince Rizzo that the Union proposal was less expensive to the company than the HIP plan. Friedman said the Union would not agree to reductions in benefits for employees and that it would not make any movement in the welfare or pension plans. However, Friedman said he would reduce the costs of the plans. Friedman said he needed time to review the company's offer and the parties agreed to meet on December 12.

Rizzo testified that the company implemented its last best offer effective January 1, 2002. It provided the benefits consistent with that offer.

Morro said that before December 6 the Union may have said the Union would strike. However, the Union met with employees and found that they were not willing to strike. Various flyers were given out by the Union to shop stewards and employees. These documents show that the Union was preparing a strike plan in November and December.<sup>20</sup> Rizzo stated that the company knew the Union was making plans to strike in November and December and that it had hired a strike coordinator.

Morro testified that he knew from the first day of negotiations that the company did not want to continue the Vacation Fund. Morro never believed that the company would continue to contribute to the Vacation Fund. Morro recalled that Rizzo said more than once that the company would not contribute to the Welfare Fund or the Pension Fund after August 31, 2001, the expiration date of the collective-bargaining agreement. The company always wanted a one year funding holiday for these funds.

### III. DISCUSSION AND CONCLUSIONS

#### A. Request for Information

There is no doubt that the Union is entitled to the hire rate and wage increase information it requested on August 13, 2001 and January 6, 2002. Respondent does not dispute the well settled law that wage information is presumptively relevant to the Union's duty as majority representative. *Curtiss-Wright Corp.*, 145 NLRB 152 (1963), *enfd.* 347 F.2d 61 (3d Cir. 1965); *Pennsylvania Power Co.*, 301 NLRB 1105 (1991).

Respondent argues that it was not required to provide the information to the Union because the demand was made in bad faith and to harass the company. Respondent urges that "the sheer breadth of the request, unaccompanied by anything but the barest explanation of its relevancy, was vexatious." Respondent points out that the August 13 request was made in the midst of a hotly contested representation election between UNITE and ATC and in the midst of negotiations for a new contract. None of these arguments is convincing. First, there is no evidence in the record of bad faith or an intention to harass on the part of the Union.<sup>21</sup> The company employs about 2633 unit members and it runs over 240 stores. A request for wage information concerning 70 or so employees does not seem unreasonable, especially in view of the high rate of employee turnover testified to by Rizzo. Moreover, the Union need not give an explanation for a request for wage information nor need it provide the employer with any proof that employees had meritorious grievances. The Union has a duty to police the contract and to ascertain that raises are being given properly. Further, the fact that Stein and Rizzo were involved in negotiations has no bearing on the request for information. A large company such as Respondent doubtless does not require its director of human resources and vice president for human resources and administration personally to compile wage information. Such information can easily be obtained by a payroll clerk from computerized records. Finally, the January 6, 2002 request for information reiterated the initial request for each employee's hire rate, information that had already been requested but not supplied, and asked for more precise information about wages being paid prior to each increase. The Union offered to have this information gathered at its own expense by

<sup>20</sup> For example, a letter to shop stewards dated November 23, 2001 mentioned the preparation of a strike plan and a press release dated December 5 charges that the company is bargaining in bad faith and says, "it looks more than ever as though our strike preparations will be needed."

<sup>21</sup> Indeed, the same documents that request the wage information show that the Union vigorously represented employees on various matters such as discipline and transfer, failure to pay overtime for time worked in excess of 40 hours, store managers forcing employees to continue working after they officially clock out, failure to replace necessary equipment, racial slurs, sick leave, holiday pay, reimbursement of expenses, workers compensation claims and the like.

an independent auditor, surely evidence of good faith and wholly devoid of a desire to harass the company. Respondent did not respond in any way to this request.

I find that Respondent violated Section 8 (a) (5) and (1) of the Act by refusing to provide the hire rate wage information requested by the Union on August 13, 2001 and the details concerning wage increases requested on January 6, 2002.

#### *B. Change in Payment of Unused Sick Leave*

The General Counsel states that the Respondent had a duty to maintain existing wages, hours and other terms and conditions of employment after the expiration of the collective bargaining agreement unless it bargained to impasse concerning proposed changes. *NLRB v. Katz*, 369 U.S. 736 (1962). The General Counsel argues that it was unlawful for Respondent to fail to pay employees for accrued unused sick leave on or about August 31, 2002.

Respondent does not dispute that a sick leave provision is a mandatory subject of bargaining which is not subject to unilateral change. *Kendall College of Art & Design*, 288 NLRB 1205 (1988).

Respondent's brief argues that "the provision did not require payment as of any specific date". Manifestly, this is incorrect. Respondent itself stipulated that payments were due on or about August 31 of each year. Further, the language of Article Sixteenth, quoted above, is clear that payments of unused sick leave are due on or about August 31 of each year.

Respondent argues that the contract language "specifically provided that the sick leave payout benefit was only applicable for the term of the Agreement." The Respondent's brief states that the company had generally reimbursed employees for unused sick leave in September at or about the time that wage increases took effect under Article Fifteenth of the Agreement.<sup>22</sup> Respondent points out that it paid employees unused sick leave in 2001 after the expiration of the contract. As stipulated by the parties, this payment was made in November 2001.<sup>23</sup> Respondent urges that the "procedure" of paying unused sick leave at the same time as implementing a wage increase was carried over into the agreement as "extended for three years subject to the modifications contained in the final offer." Thus, Respondent concludes that because the agreement as modified by the final offer provides for a January 1, 2003 wage increase it was privileged to follow the same "procedure" as formerly and pay sick leave after January 1, 2003 rather than on or about August 31, 2002.

Respondent also argues that the language of Article Sixteenth constitutes a waiver of the Union's right to bargain over the timing of these payments after the expiration of the Agreement.

Respondent's arguments ignore its own concession that when it implemented its last offer it amended the existing agreement. The record is clear that the final offer did not change the provisions of Article Sixteenth. Thus, the contract as implemented by Respondent requires payment of unused sick

leave on or about August 31 during the life of the agreement as extended by Respondent's implementation of its final offer. There is nothing in the contract implemented by Respondent tying the payment of sick leave to the implementation of wage increases.

Respondent's argument that Article Sixteenth of the contract waives the Union's right to bargain about the timing of unused sick leave payments is without merit and requires no discussion.

I find that Respondent violated Section 8 (a) (5) and (1) of the Act by failing to pay employees for accrued unused sick leave on or about August 31, 2002.

#### *C. Failure to Remit Dues Deductions to the Union*

The General Counsel states that although an employer may lawfully refuse to honor a dues checkoff clause after expiration of a collective bargaining agreement the employer violates Section 8 (a) (1) when it continues to deduct dues pursuant to unrevoked checkoff authorizations but fails to remit the dues to the union. There is no evidence in the record that any of the unit employees herein revoked their dues checkoff authorizations between August 31 and December 12, 2001.

The Board has found that "by signing checkoff authorizations the employees . . . have exercised their Section 7 rights to join and assist a labor organization. . . . [A]n employer interferes with, restrains, or coerces employees . . . where it retains for itself dues that it checked off from employees' paychecks after the expiration of a collective-bargaining agreement." *Able Aluminum Co.*, 321 NLRB 1071, 1072 (1996).

Respondent's brief contends that "due to administrative oversight" the company continued to deduct dues after the expiration of the contract on August 31, 2001. The dues were refunded to the employees right after the company declared impasse and decided to implement its last best offer on December 6, 2001.

Respondent apparently argues that it did not engage in any violation because it refunded the withheld money to the employees. The cases cited by Respondent are inapposite. Those cases were decided in a context where the employers made unilateral changes before the expiration of a contract, including failing to remit dues to the Union. In the cited cases, the employers were ordered to remit the dues to the Union until the expiration date of the contract and to refund dues, if they had been withheld, to the employees. In those cases there was no allegation that the employers had in fact checked off dues after the contracts expired and the contingency was merely alluded to as part of the remedy ordered by the Board. See *R.E.C. Corp.*, 296 NLRB 1293 (1989).

By contrast, in the instant case, it is clear that the Respondent retained for itself dues that it checked off from employees' paychecks for a period of three and one-half months while it bargained with the Union. Respondent thus interfered with, restrained and coerced its employees in violation of Section 8 (a) (1) of the Act.

#### *D. Discontinuing Payments to the Funds*

The General Counsel argues that Respondent violated the Act by unilaterally discontinuing payments to the Vacation

<sup>22</sup> Article Fifteenth provides wage increases effective in December 1998, September 1999 and September 2000.

<sup>23</sup> No wage increase was given in September 2001 while the parties were negotiating.

Fringe Benefit Fund covering periods after July 1, 2001 and the Allied Welfare Fund and the Union Mutual Fund covering periods after September 1, 2001. As set forth above, Respondent stipulated that it had not made these payments.

In resolving issues of fact relating to the negotiations I have relied on uncontradicted testimony in the record and notes taken by Counsel for the Respondent and Counsel for the Union. Where the testimony contradicts the notes, I have relied on the notes which were taken by counsel at the meetings and which are thus more likely to be reliable.

The record shows that the first time the Respondent proposed to withdraw from the Vacation and Fringe Benefit Fund and pay the employees directly was at the session of July 26, 2001. At the August 14 session Respondent again said the company wanted to delete the Vacation Fund and cease contributions as of July 1, 2001. During the next meetings on August 24 and 27 Rizzo said that the company intended to withdraw from the Vacation Fund.

The company's first proposal relating to the Welfare and Pension Funds was its request on September 14, 2000 for a four month funding holiday for both of these funds. Beginning with this meeting, Rizzo constantly emphasized to the Union negotiators his belief that the funds were too expensive relative to the company's competition, that they were overfunded and that they did not disperse enough benefits to the employees. Rizzo also was constant in his demands for information about the financial condition of the Welfare and Pension Funds. The Union consistently responded that information could only be obtained directly from the funds. The record shows that the funds were discussed at nearly all subsequent meetings and that the parties compared the cost of the ATC funds with the Local 340-A UNITE funds as well as the benefit costs of other drug-store chains. The record is clear that Rizzo constantly emphasized to the Union that improvements in wages were linked to the amount Respondent had to pay to the benefit funds.

The Respondent first asked for a one year funding holiday on August 14, 2001. The Union replied on August 24 that it would not agree to this. A funding holiday was discussed again on August 27 and 30, and the company provided information about the UNITE benefits. On August 31, the Union for the first time proposed a three month funding holiday for the Welfare and Pension Funds but it rejected a one year holiday. The Union also proposed to reduce the "float" in the Vacation Fund by proposing that no payments should be made for six months after which a lump sum would be due. Respondent, according to Murphy's notes, repeated its earlier wage offer which it had termed "not a final offer." Rizzo also asked the Union for a new wage offer.

Respondent had determined that unless a new agreement had been reached by August 31 it would discontinue payments to the ATC funds. On that day, Rizzo told the Union that if no agreement were reached the company would cease paying into the funds. The Union stated that it needed time to study and respond to the company's proposals: as set forth above, these dealt with a number of subjects in addition to wages and benefits. Rizzo then suggested a one year contract extension with no contributions to any of the three ATC funds during the year.

The Union rejected this and said it wished to continue negotiations.

At the negotiation session of August 31, 2001, the company formally notified the Union that it would stop contributing to the Welfare and Pension Funds as of September 1 and withdraw from the Vacation Fund as of July 1.<sup>24</sup>

It is well-established that an employer may not make unilateral changes in matters which are mandatory subjects of bargaining. *NLRB v. Katz*, 369 U.S. 736 (1962). Thus, an employer may not impose unilateral alterations in benefits and benefit plans at the expiration of a contract absent the existence of a good faith impasse. *Taft Broadcasting Co.*, 163 NLRB 475 (1967).

It is clear from this summary of the parties' discussions about the funds that on August 31 they were still exploring their positions and asking for information. The parties' discussions were based on the intertwined relationship between benefit costs and wages. Neither side had made a final wage proposal. Indeed, as set forth in the description of the negotiations in the "Negotiations" section above, there were many other issues on the table relating to work week, part-time employees, discipline and the like. On August 31, the Union had made two significant proposals for the first time: it had offered to reduce the six month float on the Vacation Fund that Rizzo had complained about and it had offered a three month funding holiday for the Pension and Welfare Funds; these two proposals dealt with issues deemed vital by Respondent. Thus, there is no evidence that the parties were at the end of their ability to negotiate. Neither party had proclaimed that an impasse existed. Rizzo did not say the fund contributions would be discontinued because of impasse. He merely said that the company would cease contributions because the parties had not concluded an agreement. And Rizzo testified that before the August 31 bargaining session he had agreed with Respondent's management that if there were no agreement by that date the company would cease payments to all three funds.

Respondent's brief argues that it was privileged to stop the fund contributions because the Union did not furnish information about the funds. This argument cannot be applied to Respondent's withdrawal from the Vacation and Fringe Benefit Fund. Respondent stated two reasons in negotiations for its wish to drop the Vacation Fund; first, that it was funded too far in advance of need and it therefore had a float that Respondent did not wish to finance and second, that it was an inefficient way to manage the delivery of benefits and resulted in delays and mistakes. The record does not show that Respondent ever requested information about the Vacation and Fringe Benefit Fund from the fund's trustees.

The record does show, however, that Respondent asked the Union for information about the finances of the Welfare and Pension Funds and that the Union replied that the funds had

<sup>24</sup> Before August 31, Respondent said it intended to withdraw from the Vacation fund after July 1 but the Union could have had no way to know whether this was a bargaining ploy that might change during negotiations. Respondent admittedly is always in arrears in making various payment to the employees, the Union and the funds, and between July 1 and August 31 it was still possible that the company would make up the payments to the Vacation and Fringe Benefit Fund.



separate counsel and that information must be sought from the funds directly. The record shows that Respondent asked for information directly from the funds but that it was not supplied before December 6, 2001. Even in the absence of the requested financial information the record shows that the parties negotiated about the welfare and pension benefits and that the Union made concessions, offering a funding holiday and stating that it would try to reduce the cost of the funds. Indeed, Respondent cited the cost of the Local 340-A benefits in its effort to obtain fund relief from the Union and the Union responded by comparing the costs of its welfare plan with the HIP plan. In fact, the Union argued that its plan was cheaper for the employer. Thus, the parties were able to negotiate about the welfare plan on various occasions. Further, the Union was able to respond to the employer's desire to cut the cost of welfare and pensions by offering funding holidays and reductions in payments for certain periods. Respondent has offered no legal authority for the proposition that the inability of an employer to obtain information about the financial condition of employee benefit funds privileges it to discontinue contributions at the end of a contract term in the absence of a good faith impasse in negotiations.

Respondent's brief also argues that the parties had become entrenched and reached impasse on the issue of all three funds by August 31, 2001. This argument does not take into account the facts in the record recited above. Respondent's argument fails to acknowledge the fact that it first proposed to withdraw from the Vacation Fund only on July 26, 2001. Respondent does not acknowledge the fact that it originally proposed merely a four month funding holiday for the Welfare and Pension Funds and that it did not request a one year holiday until August 14, 2001. As described above, the Union made a first proposal to deal with the fund issues on August 31, 2001. On that day, the Union proposed a three month funding holiday for the Welfare and Pension Funds and it offered a proposal to deal with the six month float in the Vacation Fund. Despite this movement on the part of the Union, the Respondent announced on August 31 that it would discontinue payments to all three funds. There is simply no evidence in the record to support Respondent's assertion that the parties were entrenched and had reached impasse. Indeed, the evidence is clear, as Rizzo himself testified, that Respondent had determined before the meeting of August 31 that it would cease its contributions to the three funds unless it reached agreement with the Union. No interpretation of the record supports the possibility that the parties could reach a collective-bargaining agreement on August 31. There was still a myriad of issues to be discussed. Further, the record is convincing that Respondent was not eager to reach agreement before the results of the election were known. By the same token, the Union was not rushing to agreement before the election. Each side hoped that a favorable election result would strengthen its hand in the negotiations. Despite the fact that negotiations had begun in September 2000 neither side had made a serious economic proposal as of August 31, 2001. Rizzo acknowledged that by August 31 the company had not made a comprehensive economic proposal because it was concentrating on reducing the cost of the funds.

I find that Respondent violated Section 8 (a) (5) and (1) by ceasing to make contributions to the Vacation and Fringe Benefit Fund, the Allied Welfare Fund and the Union Mutual Fund.

#### *E. Declaration of Impasse*

An overview of the negotiations shows that Respondent had made clear to the Union its desire for relief from Welfare and Pension Fund payments from the beginning of discussions in September 2000. From the very first, Respondent told the Union it wanted to limit its pension and welfare costs to levels in the contract with Local 340-A UNITE. At that point, Respondent asked for a four month holiday from the funds. Respondent put the Union on notice that it wanted to exclude pharmacists from the unit, that it wanted the right to hire an unlimited number of part-time employees and that it wanted to abolish the notion of a five consecutive day work week.

The Union began by rejecting demands for fund relief. Indeed, the fund representatives told the company that the Welfare Fund would rise to \$73/week. The Union rejected the notion of unlimited numbers of part-timers. The Union maintained that pharmacists should stay in the unit.

In addition, by the second meeting, the Union was aware that the company objection to the Vacation Fund was based, in part, on the fact that it was funded very early in the year and provided a large "float" of money to the Fund.

The Union's early demands in the negotiations were for written warning notices to be expunged after six months, an increase in vacation and other matters. Significantly, the Union set forth its wage demands in writing on November 30, 2000 by requesting increases of \$1.00 for pharmacists, \$.75 for assistant managers and certain others, and \$.50 for stockmen and cashiers.

The discussions continued in the same vein for several months, with the company demanding relief from fund payments and saying that in order to be competitive it had to offer higher wages and pay less money into benefit funds.

As the negotiations progressed the Union learned that Respondent had signed a new contract with Local 340-A UNITE. As a result, the Union raised its wage demands, doubling some of them. Thus it wanted \$2/hour for pharmacists in each year of the contract, \$1.50 for assistant managers, \$1.10 for stockmen and cashiers. Rather than granting the company relief on the funds, the Union proposed to do away with retroactive payment for employees retained by the company and instead collect fund payments from the first day of employment.

By July 26, Respondent had for the first time responded to the expunction demand with a two year proposal except for theft and loss prevention discipline. The company did not have a wage proposal because it was still demanding relief on the funds and linking that to wage increases. Respondent proposed withdrawing from the Vacation Fund, a position it would reiterate at all subsequent meetings with the Union. For the first time, Respondent asked for an audit of the benefit funds.

It must be remembered that during this time the Union was facing an eventual election battle with Local 340A-UNITE. Moreover, as found by the Board, Respondent was engaging in conduct unlawfully to assist Local 340-A, including taking steps to insure that employees at new stores joined Local 324-A

before the ATC could attempt to sign them up. During the August 2001 negotiations, Respondent proposed extending the contract for one year to see what the election results would be. The parties continued to discuss the funds and Respondent complained that the welfare benefits had been increased with no notice to the company. Respondent continued to demand information about the funds and it continued to link a wage increase to relief from the funds.

As the August 31 expiration date of the collective-bargaining agreement approached both the Union and Respondent changed their proposals somewhat. The company offered a token wage increase of \$.10 and \$.05 for various titles. The company continued to complain about the funds, questioning an increase in welfare benefits when the fund wanted more money from the employer and alleging that the pension was overfunded. The parties continued discussing part-timers. The Respondent had increased its demand from a four month funding holiday to a one year holiday on payments into the pension and welfare funds.

After requesting information about the cost of the Local 340-A benefits, the Union eventually proposed a three month funding holiday for the Pension and Welfare Funds.<sup>25</sup> The company responded by changing its position on retroactivity of welfare and pension contributions. The company increased by slight amounts its wage increase proposals. The Union proposed eliminating the float in the Vacation Fund by postponing the first payment by six months. The Union also changed its expunction demand from six months to one year.

After the results of the election were known in October, the Union relied on its victory to increase its demands. The Union warned that it might take action and it began strike preparations. As the negotiations continued throughout the fall of 2001, both sides changed their positions. The Union offered to reduce the Welfare Fund contribution from \$59 to \$50 per week for the first six months of the new contract. The Union increased its wage demands for titles other than pharmacist. The Company now offered to enroll the unit members in the 401(k) plan and the HIP plan in place of the existing Union pension and welfare plans. As this new phase of the negotiations progressed the Union decreased its wage demand for pharmacists to \$1.90 per hour, with similar decreases for other employees and the company responded by increasing its wage offer and proposing an incentive plan for pharmacists. On November 21, according to Rizzo, he told the Union that the company would offer more in wages if there were substantial movement on the cost of the funds.

The changes in positions continued up to and including December 6, 2001, the last bargaining session, when the Respondent announced that it was presenting its last, best and final offer. This offer included the previous proposals on part-timers, assistant managers and other items such as the incentive plan for pharmacists, the HIP and 401(k) plans and direct payment of vacations to employees. However, the company's final offer contained significant movement on the wage offer. Now, the

employer offered pharmacists a raise of \$.60 in each year of a three year contract in addition to the incentive plan, and raises of \$.40, \$.30 and \$.20 in each year for all other titles. Both Murphy's and Friedman's notes show that after this proposal was made the Union asked questions about the pharmacist incentive plan and then the Union reduced its wage demand to \$1.80 per year for pharmacists without an incentive plan. The Union also reduced its wage demand for all others to \$.50 every six months. Friedman's notes show that he said that he had more room to move and that he would address the Welfare Fund costs. However, the ATC would not agree to a reduction in benefits. Murphy's notes show that Friedman compared the costs of the HIP plan to the current ATC welfare plan and tried to convince Rizzo that the Union proposal was less expensive to the company than the HIP plan. Friedman said the Union would not agree to a reduction in benefits for employees and that it would not make any movement in the welfare or pension plans. However, Friedman said he would reduce the costs of the plans. Friedman said he needed time to review the company's offer and the parties agreed to meet on December 12.

This recital of the bargaining history shows that movement in the parties' proposals continued steadily and even took place on December 6, the day the company declared impasse. Rizzo had agreed with company management that he would present a final offer on December 6 and that he would announce its implementation. Respondent adhered to its plan even though its last best offer produced a reduction in the Union's wage demands and a statement by Friedman that he would address the welfare and pension fund costs. Clearly, Respondent was determined to declare impasse and implement its last offer even in the face of continued movement and a desire to bargain on the part of the Union. I note that at trial Rizzo denied that the Union had reduced its wage demand in response to his proposals on December 6. This is evidence of Rizzo's determination to declare impasse on December 6 no matter what the Union may have done.

The Board has commented that Taft Broadcasting "sets forth the standards for determining whether parties have exhausted the prospects of concluding an agreement and a bargaining impasse exists. Factors such as the parties' bargaining history, their good faith, the length of time spent in negotiations, the importance of the issues about which the parties disagree, and the parties' contemporaneous understanding of the status of negotiations are all relevant parts of the analysis." *Intermountain Rural Electric Assn.*, 305 NLRB 783,788 (1991).

The bargaining history shows that the parties continued to discuss the costs of their proposals, to change their positions and to try to accommodate the other side's needs right up to December 6, the date the employer had determined to announce that it would implement its final offer. Thus, it cannot be said that the parties had exhausted the prospects for concluding an agreement. On December 6 Friedman said he would reduce the funds' costs without reducing benefits. This was an issue of major importance to both parties and had Friedman been given the opportunity to formulate a proposal it might well have signaled a major step toward a negotiated collective-bargaining agreement. Significantly, the company's wage offer presented on December 6 was much higher than its previous offers and it

<sup>25</sup> The Union never changed its offer of a three month funding holiday, although it occasionally shifted the proposal from months 1, 5 and 9 to months 1,5 and 8. These changes are without significance.

might have proven very attractive to the Union if bargaining had continued. Friedman said on December 6 that he needed more time to study and respond to the Respondent's new proposals but Rizzo's announcement that the company would implement the last offer within three days deprived the Union of an opportunity to make further significant movements and advance its counterproposals. *Lafayette Grinding Corp.*, 337 NLRB 832 (2002).

The length of the negotiations is not significant in the particular circumstances of this case. The record shows that both parties were content to await the results of the election which had been ordered in August 2001 and not concluded until that fall. Respondent hoped, consistent with its unlawful assistance to 340-A UNITE, that the ATC would lose the election. The Union hoped it would win and thus gain more bargaining power in the negotiations for a new contract. Thus, the fact that the negotiations were protracted does not lead to a conclusion that the parties were at impasse.

A discussion of the good faith element required by Taft does not show that Respondent bargained in good faith. Rizzo and the company management had determined before December 6, 2001 that the company would implement the last, best offer - an offer which was presented to the Union for the first time on December 6. Despite the fact that the Union asked for another meeting and stated that it would deal with a reduction in cost for the welfare and pension funds Rizzo persisted in his position that his offer would be implemented by Respondent. Further, the company had already engaged in violations of the Act that went directly to the ability of the Union to represent the employees. The company had failed between August and December 2001 to provide the Union with wage increase information that was necessary for the Union to represent its unit members. The Respondent had failed to remit to the Union the dues which it was still withholding from the employees' paychecks. Finally, the company had formally announced on August 31 that it was unlawfully withdrawing from the Vacation Fund and ceasing contributions to the Pension and Welfare Funds. This action was calculated to injure the employees' ability to continue their pension membership and to continue with their medical insurance plan. Pension and welfare matters are of vital importance to employees and any unlawful change must have a major effect on the confidence of the employees in their bargaining representative. As the Board found in *Intermountain Rural Electric Assoc.*, supra, unilateral action relating to major topics that are crucial to the bargaining have an adverse effect on the negotiations and prevent the attainment of a valid impasse. 305 NLRB at 789. Here, the unilateral withdrawal from the three benefit funds contributed to the parties' inability to reach an agreement by changing the status quo and moving the baseline for negotiations. *Lafayette Grinding Corp.*, supra, 337 NLRB 833.

In conclusion, I find that the parties had not reached a good faith bargaining impasse because they had not exhausted their negotiations and because the Respondent's unremedied unfair labor practices hampered the parties' ability to reach a negotiated contract. The Respondent violated Section 8 (a) (5) and (1) of the Act by implementing its last, best and final offer after December 6, 2001.

#### CONCLUSIONS OF LAW

1. By refusing to provide hire rate wage information requested by the Union on August 13, 2001 and the details concerning wage increases requested on January 6, 2002 Respondent violated Section 8 (a) (5) and (1) of the Act.

2. By failing to pay employees for accrued unused sick leave on or about August 31, 2002 Respondent violated Section 8 (a) (5) and (1) of the Act.

3. By retaining for itself and failing to remit to the Union dues that it checked off from employees' paychecks Respondent violated Section 8 (a) (1) of the Act.

3. By unilaterally ceasing to make contributions to the Vacation and Fringe Benefit Fund, the Allied Welfare Fund and the Union Mutual Fund Respondent violated Section 8 (a) (5) and (1) of the Act.

4. By prematurely declaring impasse and unilaterally implementing its final offer after December 6, 2001 Respondent violated Section 8 (a) (5) and (1) of the Act.

5. The General Counsel has not shown that the Respondent violated the Act in any other manner.

#### REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having failed to make contributions to the Vacation and Fringe Benefit Fund, the Allied Welfare Fund and the Union Mutual Fund it must make whole its employees by reimbursing them for expenses ensuing from its failure to make such contributions, plus interest. *Kraft Plumbing & Heating*, 252 NLRB 891 fn.2 (1980), enf'd. 661 F.2d 940 (9 superth Cir. 1981). Additional amounts shall be paid to the Vacation and Fringe Benefit Fund, the Allied Welfare Fund and the Union Mutual Fund in the manner set forth in *Merryweather Optical Co.*, 240 NLRB 1216 fn. 7 (1979). Interest shall be computed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

The Respondent having unlawfully implemented its final offer of December 6, 2001 it must rescind implementation of its terms and restore the terms and conditions of employment existing prior to the unilateral change. In addition, Respondent must restore the terms and conditions which applied to unused sick leave prior to the unlawful change in September 2002. Employees shall be made whole for losses suffered as a result of Respondent's unilateral changes in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), plus interest as described above.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>26</sup>

<sup>26</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

## ORDER

The Respondent, Duane Reade, Inc., New York, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from
  - (a) Refusing to provide requested wage information to the Union.
  - (b) Failing to pay employees for accrued unused sick leave.
  - (c) Retaining for itself and failing to remit to the Union dues that it checks off from employees' paychecks.
  - (d) Unilaterally failing to make contributions to the Vacation and fringe Benefit Fund, the Allied Welfare Fund and the Union Mutual Fund.
  - (e) Prematurely declaring impasse and unilaterally implementing its final offer.
  - (f) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.
2. Take the following affirmative action necessary to effectuate the policies of the Act.
  - (a) Provide to the Union all of the information it requested on August 13, 2001 and January 6, 2002.
  - (b) Rescind implementation of the final offer dated December 6, 2001 and restore the terms and conditions of employment existing prior to the unlawful changes as described in the Remedy section above.
  - (c) Make whole the Vacation and Fringe Benefit Fund, the Allied Welfare Fund and the Union Mutual Fund and reimburse employees for any expenses resulting from the unlawful failure to make contributions to these funds in the manner set forth in the Remedy section above.
  - (d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of reimbursement due under the terms of this Order.
  - (e) Within 14 days after service by the Region, post at all of its facilities where employees are represented by the ATC copies of the attached notice marked "Appendix."<sup>27</sup> Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a

copy of the notice to all current employees and former employees employed by the Respondent at any time since August 31, 2001.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. February 18, 2004

## APPENDIX

## NOTICE TO EMPLOYEES

## POSTED BY ORDER OF THE

## NATIONAL LABOR RELATIONS BOARD

## An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

## FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist any union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT refuse to provide necessary wage information requested by the Allied Trades Council.

WE WILL NOT fail to pay employees for accrued unused sick leave.

WE WILL NOT deduct union dues from your paychecks and fail to remit the sums to the Union.

WE WILL NOT fail to make contributions to the Vacation and Fringe Benefit Fund, the Allied Welfare Fund and the Union Mutual Fund.

WE WILL NOT declare an impasse in bargaining with the Allied Trades Council and unilaterally impose our final offer before an impasse has actually been reached.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL provide the Allied Trades Council all the wage information it requested on August 13, 2001 and January 6, 2002.

WE WILL rescind implementation of our final offer dated December 6, 2001 and restore the terms and conditions of employment existing prior to the unlawful changes, with interest where appropriate.

WE WILL make required contributions to the Vacation and Fringe Benefit Fund, the Allied Welfare Fund and the Union Mutual Fund and we will reimburse you for any expenses resulting from our failure to make contributions to these funds with interest where appropriate.

DUANE READE, INC.

<sup>27</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

